

1988

State of Utah v. Michael C. Thompson and Bruce A. Conklin : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT.
BRIEF

880181

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff-Respondent,	:	
	:	No. 880181
vs.	:	
	:	
MICHAEL C. THOMPSON, BRUCE A.	:	
CONKLIN,	:	<u>PRIORITY CLASSIFICATION NO. 13</u>
	:	
Defendants-Appellants.:	:	

BRIEF OF APPELLANTS

Appeal from a ruling of the Utah Court of Appeals

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LIST OF ALL PARTIES TO PROCEEDING

Appellants

Michael C. Thompson, Bruce A. Conklin

Respondent

State of Utah

RELATED CASES AND PARTIES THERETO

In the Matter of a Criminal Investigation, Utah Supreme Court, No. 20268. Appellant: State of Utah. Respondents: Michael C. Thompson, Bruce A. Conklin, Michael Ziemski, Patricia Thompson Bowman, Mike Thompson & Associates, Guardex, Alarmex, Vanguard, Inc., Carl Stott, Orrin Colby, Jr., Norm Maxfield, Utah Power & Light Company, Emery Mining Company and L. Brent Fletcher.

State of Utah v. Thompson, et al., Third District Court, Salt Lake County, No. C84-2432. Plaintiff: State of Utah. Defendants: Michael C. Thompson, L. Brent Fletcher, Bruce A. Conklin, Patricia Thompson Bowman, Michael Ziemski, Security Management Consulting Services, Augie Investments, Information Associates, Mike Thompson Associates, Guardex, Alarmex, Securitel, Metro-Tac, Federal Security Network, Vanguard International Associates, Inc., Vanguard Great Basin Patrol Division, Inc., Mike Thompson Associates, Inc., MTA Security Services, Inc., and Police and Security Equipment Corp.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in admitting evidence obtained in violation of state and federal constitutional provisions?
2. Did the Court of Appeals err in upholding the trial court's ruling?

STATEMENT OF THE CASE

Defendants were charged with several criminal counts of commercial bribery, antitrust boycott and racketeering.

PROCEDURAL HISTORY

On January 26, 1983, Judge Boyd Bunnell of the 7th District authorized the Attorney General's office to conduct a criminal investigation pursuant to the Subpoena Powers Act. Based almost entirely on evidence discovered during the course of the investigation, criminal charges were filed against Appellants and other co-Defendants in 3rd District. Appellants were tried in 1985. Prior to trial the Appellants were granted a severance from the trial of co-defendant L. Brent Fletcher. Appellants moved to suppress evidence obtained pursuant to the secret investigation conducted by the Attorney General. The motion was denied. The Appellants were found guilty on counts charging bribery, anti-trust and racketeering violations. Appellant Michael Thompson was sentenced to serve not less than one nor more than fifteen years in the Utah State Prison. Appellant Bruce Conklin was sentenced to serve one year in the Salt Lake

County Jail on work release. Each was fined \$25,000 for the antitrust violations. Based on the racketeering convictions the Court also ordered forfeiture of all business interests of Appellants in their security guard companies.

During trial, Appellants moved for mistrial on the basis that the prosecution had improperly elicited from two witnesses the fact that co-defendant Fletcher had previously been tried on the same charges and on the further basis that a juror had discovered the fact that Fletcher was convicted. These motions were denied. Appellants filed a Notice of Appeal on September 13, 1985. (R.439)

Petitioners' sentences were stayed pending appeal. (R.478) The appeal was originally filed in this Court but was subsequently transferred to the Utah Court of Appeals and heard there. Two members of the Utah Court of Appeals panel voted to affirm the convictions. Judge Gregory K. Orme dissented as to the group boycott antitrust convictions. State v. Thompson, 751 P.2d 805 (Utah App. 1988)¹ Appellants Thompson and Conklin petitioned the Court for a Rehearing. The Petition was denied April 8, 1988. Appellants filed a petition for certiorari which was granted July 7, 1988.

¹ This case was inadvertently given the heading State v. Fletcher in the Pacific Reporter advance sheets. The trial of Mr. Fletcher was severed from that of Appellants. Each appealed separately.

STATEMENT OF FACTS

Pursuant to the Utah Subpoena Powers Act, Utah Code Ann. §§ 77-22-1 through 77-22-3, the Attorney General instigated a secret investigation centered on alleged misconduct in the handling of Utah Power & Light's security contracts. Subpoenas were issued by the Attorney General's office without prior judicial review or approval. In re Criminal Investigation, 754 P.2d 633, 638 (Utah 1988)² The subpoenas stated that they were authorized by Order of the District Court and that disobedience was punishable by contempt. (See Appendix, Page 1) None of the subpoenas described the nature or scope of the investigation, nor were the recipients informed as to the general subject matter of the investigation. In re Criminal Investigation, 754 P.2d at 638. Persons receiving the subpoenas were instructed by the Attorney General that a secrecy provision of the Act prohibited them from speaking to anyone other than their attorney concerning the proceedings. (Id.) Pursuant to information discovered during the investigation, criminal charges were brought against Appellants in April of 1984. Id.

The investigation continued in the same manner following the filing of criminal charges. Id. In May of 1984, officers and

²Due to the secret nature of the investigation, very little information on the investigation itself is contained in the court file; therefore, many of the facts surrounding the conduct of the investigation are drawn from the Court's opinion in In re Criminal Investigation.

employees of Utah Power & Light filed a Motion to Quash Subpoenas issued in aid of the criminal investigation. Utah Power & Light argued that the Subpoena Powers Act was unconstitutional on its face and as applied. In re Criminal Investigation, 754 P.2d at 639.

Judge Bunnell ruled on their motions May 30, 1984, holding the Act constitutional provided that the prosecutors (i) inform subpoenaed witnesses whether they were targets of the investigation, (ii) inform targets of the nature and scope of the matter under investigation, and (iii) conduct the investigation within the parameters of the good cause affidavit. Id.

In August, Emery Mining moved to quash an investigative subpoena sent by the Attorney General as part of the ongoing investigation. Judge Bunnell granted the Motion to Quash and various motions to reconsider his earlier ruling on the constitutionality of the statute. Id. On reconsideration, Judge Bunnell held that the act was vague and violated the rights of due process and the right against self-incrimination. (Appendix, Pages 3 through 7) In terminating authority for the investigation, the Court cited the following as examples of the abuses which had occurred. Subpoenas sent to an accounting firm demanded "all books, records and papers of any kind relating to Mike Thompson and Associates . . . Mike Thompson, individually, Bruce Conklin, individually, . . . and all other individuals

and/or entities associated therewith." Judge Bunnell also cited as abuse the fact that the deposition of Brent Fletcher, who was named as a co-defendant along with Thompson and Conklin, was taken in violation of the safeguards imposed by the Court. (Appendix, Page 5)

Following Judge Bunnell's ruling, Appellants brought a motion before Judge Billings, the trial judge, to suppress the evidence obtained in violation of their constitutional rights in the criminal investigation. That matter was heard December 27, 1984. (Supplemental Record pages 1-29) On January 10, 1985, Judge Billings, by Memorandum Decision, denied Appellants' Motion and ruled that: (1) Judge Bunnell's ruling that the statute was unconstitutional constituted the "law of the case," (2) that the proper standard for determining whether the evidence must be suppressed was Utah Code Annotated § 77-35-12(g); and (3) Defendants failed to carry their burden of proving both a) that the State's conduct resulted in a substantial violation of their constitutional rights, and b) that the acts of the State were not committed in good faith reliance on what it assumed was a constitutional statute. (Appendix, Pages 8-14)

The case proceeded to trial in July of 1985. (R.686) Appellants were convicted. (R. 448-460) Appeal was taken and briefs filed with the Utah Supreme Court; however, in transferring cases to the newly created Court of Appeals, this case

was sent down to the lower court. The trial judge, Judge Billings, was by then a judge on the Court of Appeals.

In December of 1987, the Utah Supreme Court, in State v. Mendoza, 748 P.2d 181 (Utah 1987), held that Utah Code Annotated § 77-35-12(g) impermissibly shifted the burden of proving a substantial violation of constitutional rights and lack of good faith on the part of the police officers to the Defendants and was therefore unconstitutional. This ruling invalidated both the statute and the reasoning upon which Judge Billings based her ruling in this case.

The Court of Appeals, recognizing that the basis for Judge Billing's ruling had been invalidated by Mendoza, substituted the federal "Good Faith" exemption to the exclusionary rule created in United States v. Leon, 468 U.S. 897 (1984). Applying a recently created extension to that doctrine which was enunciated in Illinois v. Krull, 480 U.S. 340, 107 S. Ct. 1160, 94 L.Ed. 2d, 364 (1987), the Court of Appeals stated:

This Court may affirm a trial court's decision to admit evidence on any proper ground, even though the trial court assigned another reason for its ruling. Regardless of the decision of the Utah Supreme Court on the constitutionality of the Utah Mini-Grand Jury Act, we hold the evidence obtained pursuant to the subpoenas duces tecum was admissible under the principles set forth in Krull. The trial court's denial of defendants' motion to suppress is affirmed.

State v. Thompson, 751 P.2d 805, 810 (Utah App. 1988) (citations omitted).

Just three weeks after the Court of Appeals issued its opinion in the instant case, this Court released its opinion in In re Criminal Investigation, wherein this Court agreed that the Subpoena Powers Act had been applied in an unconstitutional manner in this case, but upheld the constitutionality of the Subpoena Powers Act by construing it to contain limitations in addition to those initially imposed by Judge Bunnell. In re Criminal Investigation, 754 P.2d at 636.

Appellants' Motion for Reconsideration was denied. The Supreme Court granted certiorari to consider whether the evidence obtained through the unconstitutional investigation should have been suppressed at trial.

SUMMARY OF ARGUMENT

The grounds and reasoning supporting the Trial Court's admission of the evidence gathered in the investigation have been soundly rejected by this Court. The Court of Appeals' basis for affirming the trial court's ruling is not applicable to our fact situation, since there was no "good faith reliance" on the statute and since the purpose of the exclusionary rule will be served by exclusion of the evidence in this case. Article I, Section 26 of the Utah Constitution prohibits application of the reasoning relied on by the Court of Appeals to violations of state constitutional law. The reasoning of the federal case relied on by the Court of Appeals should be rejected to preserve the independence and integrity of State constitutional rights.

ARGUMENT

I.

THE CRIMINAL INVESTIGATION WAS CONDUCTED IN VIOLATION OF APPELLANT'S RIGHTS

The evidenced gathered by the Attorney General under the Subpoena Powers Act violated Appellants' rights to be free of unreasonable searches as guaranteed by the Fourth Amendment of the U.S. Constitution and Article I Section 14 of the Utah Constitution; their rights under the Fifth Amendment and Article I § 12 of the Utah Constitution to avoid self incrimination and their rights of due process and equal protection, as guaranteed by the 14th Amendment and by Article I § 24 of the Utah Constitution.

A. Search and Seizure.

In Boyd v. United States, 116 U.S. 616 (1886), the Court first stated the principle that evidence seized in violation of Defendants' Fourth Amendment rights is inadmissible. That case, decided prior to the adoption of the Utah Constitution in 1896, invalidated a statute which authorized the court, upon motion by the prosecutor, to require the Defendant to produce in court his private books, invoices and papers. The statute in question allowed the prosecutor to make an allegation and then, if "in his belief any business, books, invoices or papers belonging to or under the control of, the defendant or claimant, will tend to

prove any allegation made . . . may, at its discretion, issue notice to the defendant or claimant to produce such books, invoices, or papers in Court. . . ." Boyd, 116 U.S. at 620. The Supreme Court, after an eloquent recitation of the historical antecedents of the Fourth Amendment, stated: "any compulsory discovery by extorting the parties oath, or compelling the production of his private books and papers, to convict him of a crime, or to forfeit his property, is contrary to the principles of a free government." Boyd, 116 U.S. at 631-32.

The Court held that the statute violated both Fourth and Fifth Amendment rights stating

these two Amendments throw great light on each other. For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man "in a criminal case to be a witness against himself".

Boyd, 116 U.S. at 633.

In the instant case, the Attorney General issued subpoenas for the "books, papers, records", of Appellants. These were issued to Appellants' bankers, accountants and business associates, compelling production of the documents by order of the court. Failure to comply was punishable by contempt. This Court, in In re Criminal Investigation, held that these actions "denied rights guaranteed by the act and by the Fourth Amendment. U.S. Constitution Amendment IV." 754 P.2d at 659.

These actions also denied Appellants the protections guaranteed by Article I, Section 14 of the Utah Constitution.

Since that provision must provide at least as much protection as the Fourth Amendment, a Fourth Amendment Violation is by necessity a violation of Article I, Section 14; therefore no additional analysis regarding the scope of the protection offered under the State Constitution is necessary when a federal violation has been established. See Industrial Comm'n. v. Wasatch Metal, 594 P.2d 894 (Utah 1979).

In In re Criminal Investigation, this Court held that without the warnings and notice requirements inherent in the act that the opportunity for pre-compliance challenge of the subpoenas was stifled and that such warnings were necessary to protect Defendants' rights. It is undisputed that such warnings were not given in the instant case. The failure to give these warnings violated Appellants' rights.

The Court construed the secrecy provision of the Subpoena Powers Act to require disclosure of the good cause affidavit. In re Criminal Investigation, 754 P.2d at 656. Also, the Court concluded that all investigations must be fully documented and that such documentation be maintained by the district court authorizing the investigation. In re Criminal Investigation, 754 P.2d at 653. Without this documentation the district court would have no way to adequately supervise the investigation. Without access to the good cause Affidavit, individuals receiving subpoenas would have no way to determine whether the information sought came within the scope of the affidavit. See, In re

Criminal Investigation, 754 at 654. In the instant case, this Court found that the secrecy provisions of the Act were applied too broadly. This flaw, and the failure to fully document the investigation, prejudiced Appellants by preventing any meaningful pre-compliance challenge of the subpoenas until the investigation was nearly complete. When the subpoenas were challenged, the challenges were upheld. Had the warnings and notices been given in this case as the Court has required, Defendants could have challenged the issuance of the subpoenas at a time when the challenge would have afforded adequate protection of their rights.

The manner in which the investigation was carried out in the instant case violated Defendants' rights under the Fourth Amendment and Article I, Section 14 of the Utah Constitution. Therefore, all evidence seized as a result of the investigation must be suppressed. Weeks v. United States, 232 U.S. 383 (1914); State v. Mendoza, 748 P.2d 181 (Utah 1987).

B. Self-Incrimination.

As noted by the Court in Boyd, the rights guaranteed by the Fourth and Fifth Amendments are often very closely related. In analyzing the constitutionality of the Subpoena Powers Act, this Court held that in order to protect the rights against self-incrimination guaranteed by the Fifth Amendment, and more particularly by Article I, Section 12 of the Utah Constitution,

that "the state's attorney must notify every witness prior to interrogation (i) of the general subject matter of the investigation, (ii) of the existence and nature of the privilege against self-incrimination, (iii) that the information provided may be used against the witness in a subsequent criminal proceeding, and (iv) of the right to have counsel present. In re Criminal Investigation, 754 P.2d at 648. Only the final warning regarding the right to counsel was afforded the witnesses in the instant case. Had these warnings been given as is now required, the witnesses may have refused to answer certain questions or may, under the protection of Article I Section 12, may have been able to exercise their right to remain silent. See, In re Criminal Investigation, 754 P.2d at 660, (Stewart, Justice, dissenting.)

Article I, Section 12 imposes another requirement that special warnings be given to the targets of the investigations to apprise them of their rights. The target warnings required by the Act were not given in this case. The deposition of Brent Fletcher was taken without informing him that he was a target of the investigation. (Appendix, P.5). The targets of the investigation were never apprised of their status or given an opportunity to assert the rights guaranteed by Article I, Section 12.

Without the Constitutional safeguards required by this Court, the Subpoena Powers Act violates the self-incrimination

provisions of both the Fifth Amendment to the United States Constitution and Article 1, Section 12 of the Utah Constitution. Since the evidence gathered as a result of the investigation in the instant case was done so in violation of these rights, the information thus gathered is inadmissible and Appellants' motion to suppress should have been granted.

C. Due Process.

The unique circumstances of this case have had the effect of denying Appellants due process of law guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution and Article I Section 7 of the Utah Constitution. The investigation was authorized by the 7th District Court which bore responsibility for its supervision. Under that authority Judge Bunnell terminated the investigation because of violations of constitutional rights of the subjects of this investigation (Appendix, Page 6). However, since the criminal actions spawned by the investigation were filed in Third District Court, Judge Bunnell lacked jurisdiction to rule on the admissibility of the evidence gathered.

This reveals one problem with the Subpoena Powers Act not addressed by the Court in In re Criminal Investigation. The considerable power of the court to supervise the investigation, and thus insure the protection of individual rights, is ineffective if, as here, the supervising court does not have power to

rule on the admissibility of evidence. This problem was seriously compounded in the instant case by the failure to make an adequate record of the investigation. The minimum requirements for documentation outlined in In re Criminal Investigation, 754 P.2d at 653, were not met in this case. Appellants were forced to argue this case before a judge who was unfamiliar with the details of the investigation and they were improperly saddled with the burden of proving both a "substantial violation" of fundamental rights and "lack of good faith" on the part of the investigating officer. See State v. Mendoza, 748 P.2d 181 (Utah 1987). Furthermore, they were forced to carry this burden on the basis of a record which was constitutionally inadequate and which had been improperly withheld from them.

The procedural guarantees of the Bill of Rights contain limitations on the exercise of the government's power over its citizens which are so fundamental to a fair and ordered system of justice that the absence of one or another of these particular guarantees denies a suspect or a defendant due process of law. See Palko v. Connecticut, 302 U.S. 319 (1937).

In conducting the investigation in violation of the safeguards imposed by Judge Bunnell, and without the procedures imposed on the Subpoena Powers Act by this Court, the State committed wholesale violations of fundamental rights in gathering the evidence used against Appellants in this case. The notion of

"due process of law" contained in the 5th and 14th Amendments and Article I, Section 7 of the Utah Constitution requires more than an after-the-fact acknowledgement that additional safeguards should be required. "When state action impinges on fundamental rights, due process requires standards which clearly define the scope of permissible conduct so as to avoid unwarranted intrusion on those rights." In re Boyer, 636 P.2d 1085 (Utah 1981). This Court has acknowledged that the investigation conducted impinged on fundamental rights. The application of the Subpoena Powers Act to Appellants was a denial of due process, if not because the standards were unclear, because the standards simply were not applied.

The fact that the Act can, if certain guidelines are followed, be applied in a constitutional manner does not change the fact that the Act, as applied in the instant case did not adequately protect the rights of the witnesses or the targets of the investigation. By conducting the investigation in a manner which impeded judicial supervision and was inconsistent with fundamental constitutional principals, the state denied Appellants' rights to due process of law as guaranteed by the State and Federal Constitutions.

D. Equal Protection/Uniform Operation of Laws.

As demonstrated both by Respondents in In re Criminal Investigation, and by Appellants in this case, the Subpoena Powers Act was applied unconstitutionally in this instance. Due

to the procedural requirements imposed by this Court, the Subpoena Powers Act can no longer lawfully be applied in the same manner as it was applied in the instant case.

The Utah Constitution Article I, Section 24 provides "all laws of a general nature shall have uniform operation." Although this provision may differ in both language and scope from the Federal provision, it embodies the same general principle as the 14th Amendment. Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 888-89 (Utah 1988). That principle, simply stated is that the law cannot be applied one way to one person and another way to someone similarly situated.

Any person who is targeted for an investigation conducted under the Subpoena Powers Act must be afforded the safeguards imposed by the Court. To require less would violate the rights of the subjects of the investigations. Appellants are guaranteed by the Constitution uniform operation of the law. They seek only to be afforded protection equal to that which the Constitution requires be given any subject of an investigation under the Act. If the Subpoena Powers Act requires full documentation of

the investigation, or adequate warnings to persons subpoenaed, or notice to targets of the investigation in order to be applied in a constitutional manner, then Appellants need be afforded these rights. The failure to offer Appellants the required constitutional safeguards denies the protection afforded every other citizen who comes under the jurisdiction of the Subpoena Powers Act. Allowing evidence gathered in violation of the Court's construction of the Act is prohibited by the constitutional guarantees of equal protection and "uniform operation" of law.

II.

THE UNCONSTITUTIONAL ASPECTS OF THE CRIMINAL INVESTIGATION TAINTED ALL OF THE EVIDENCE.

Appellants assert that all of the evidence sought to be suppressed was gathered in direct violation of their rights under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 7, 12, 14, 24, 25, 26, and 27 of the Utah Constitution. However, any evidence gathered during the course of the investigation which was not a direct result of violations of Appellants' constitutional rights was the direct result of violations of the constitutional rights of each person subpoenaed. See In re Criminal Investigation, 754 P.2d 633. All information gathered in the investigation is therefore tainted and must be suppressed as "fruit of the poisonous tree". Wong Sun v. United States, 371 U.S. 471 (1963); U.S. v.

Ceccolini, 435 U.S. 268, 275 (1978); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); State v. Lee, 633 P.2d 48 Utah 1981).

In Wong Sun, the police burst into a Chinese laundry looking for drugs. The initial search was not based on probable cause and uncovered no evidence. However, the subject of the search, intimidated by the police conduct, gave information which allowed the investigation to broaden and eventually resulted in the seizure of a small amount of heroin and an arrest and conviction. Even though the illegal search in Wong Sun did not directly violate the rights of the defendant, evidence seized because of information gathered in the illegal search was suppressed as being "fruits of the poisonous tree."

The facts of this case are analagous. The investigation was conducted in a fashion that violated the Constitutional rights of the persons receiving the subpoenas. See In re Criminal Investigations, 754 P.2d 633. Each person subpoenaed and each document uncovered by the subpoenas added a piece to the puzzle in the prosecution's very complicated case and also added a link to the paper chain of evidence that was presented to the jury.

The policy underlying the rule against the use of evidence obtained by unconstitutional means cannot be circumvented simply because the illegal search uncovered evidence indirectly instead of directly. See Walder v. United States, 347 U.S. 62 (1954).

Without the evidence obtained in violation of the rights of each person answering a subpoena issued under the special investigation, the prosecution would not have been able to put together the long, complex scenario of allegations which form the basis of the charges against Appellants. Therefore, all evidence, whether gathered in direct violation of Appellants' rights, or the rights of others, or whether indirectly resulting from information so gathered, is tainted by the unconstitutional acts and therefore must be excluded as "fruits of the poisonous tree." See Goldstein v. United States, 316 U.S. 114, 120 (1942); see State v. Lee, 633 P.2d 48, 52 (Utah 1982); State v. Northrup, 756 P.2d 1288, 1295 (Utah App. 1988).

III.

THE TRIAL COURT ERRED IN ADMITTING TAINTED EVIDENCE.

Judge Billings' ruling admitting the evidence was based on the statutory good faith exception contained in Utah Code Ann. § 77-35-12(g). This Court, in State v. Mendoza, 748 P.2d 181 (Utah 1987), held that statute unconstitutional. One of the fatal flaws in § 77-35-12(g) was that it shifted the burden to the defendant to "prove the equivalent of police conduct made in bad faith before the Court can apply the exclusionary rule." Id. at 186. Another basis for striking down the statute was that it required a threshold requirement of a "substantial violation" of Defendant's rights that went beyond what was required by United States v. Leon, 468 U.S. 897 (1984).

This, the flawed portion of the statute, formed the basis of the trial court's reasoning in admitting the evidence. At trial, the State argued: "Now, if Defendants are to succeed in this motion it is their burden to show the lack of good faith and to show substantial violations of constitutional rights. . . ." (Supplemental Record, Pages 25 and 26). In denying the Motion to Suppress, the trial court stated:

[D]efendants' Motion to Suppress is denied as they have not shown: (1) that the State's conduct in its use of the "Subpoena Powers Act" in the case resulted in a substantial violation of Defendants' constitutional rights, and (2) that the acts of the State were not committed in good faith reliance on what it assumed was a constitutional criminal statute.

Appendix page 13.

Clearly, the trial court placed the burden of proof on the Defendants. In State v. Mendoza, 748 P.2d at 186, this Court states:

Pursuant to Mapp, if the defendant establishes a fourth amendment violation, the illegally-seized evidence must be suppressed regardless of the egregiousness of, or the intentions motivating, the police officers' conduct. Mapp, 367 U.S. at 655, 81 S. Ct. at 1891. Because Leon is an exception to the application of the exclusionary rule, the State must prove the necessary elements of the "good faith" exception.

Nowhere in the transcript of the suppression hearing is there any evidence which would support a finding that the State carried its burden of showing "good faith" reliance.

The trial court impermissibly shifted the burden of proof to the Appellants and held them to a standard whose threshold was higher than that allowed under the Federal Constitution. Under the proper standard of review the state is required to prove the application of the good faith exception. Since both the grounds and the reasoning supporting the trial court's decision have been struck down by this Court, its ruling denying Appellants' Motion to Suppress should be reversed.

IV.

THE COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT'S RULING

The Court of Appeals, recognizing that the basis for the trial court's ruling was no longer sound, stated it could uphold the trial court's decision to admit evidence if there were a proper basis to do so. State v. Thompson, 751 P.2d 805, 810 (Utah App. 1988). The Court of Appeals' basis for admissibility was the principle set forth in Illinois v. Krull, 480 U.S. 340, (1987). In that case, a police officer conducted a warrantless administrative inspection of an auto salvage yard pursuant to statutory authority. The day following the search, the statute was held unconstitutional. The trial court granted the Defendant's motion to suppress evidence seized in the search. The Illinois Supreme Court affirmed, rejecting the argument that the officer had relied on the statute in good faith See People v. Krull, 107 Ill 2d 107, 481 N.E.2d 703, 708 (1985). The United States Supreme Court reversed and said that since the officer's

actions were authorized by statute that no deterrent effect would be served by exclusion of the evidence. Illinois v. Krull, 480 U.S. ___, 96 L.Ed. 2d 375. (Hereinafter cited as Krull).

The Court of Appeals' reliance on Krull is misplaced. First, Krull's reasoning is not applicable to our factual situation, second, even if Krull is applied, there was no "good faith reliance" on the statute, third, Krull's result is impermissible under the Utah Constitution, and finally, the rationale of Krull should not be applied to violations of Appellants' state constitutional rights. These arguments will be addressed separately.

A. The Exclusionary Rule Exception Found in Illinois v. Krull is Not applicable to our Factual Situation.

Krull relies on Leon's characterization of the purpose of the exclusionary rule as being simply to deter misconduct on the part of the state. The majority reasons that "unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law," therefore suppressing the evidence seized by a officer acting in objective reliance on a statute would have little deterrent effect. Krull, 480 U.S. ___, 94 L.Ed. 2d at 375.

Unlike Krull, application of the exclusionary rule in this case will have a deterrent effect. In upholding the constitutionality of the Subpoena Powers Act, this Court imposed guidelines designed to protect constitutional rights, however, as the

Court recognized, the Act still vests considerable discretion in the investigating authority and may still be subject to abuse. Application of the exclusionary rule in this case is necessary and will have a deterrent effect in future cases. Unless there is a penalty imposed on the abuse of the considerable powers granted under the Act, there is nothing to restrain the investigating authority from pressing the limits imposed by this Court beyond constitutional boundaries.

Where the statute is declared unconstitutional as in Krull, no further reliance can be made on it and there is no danger of the same type of violations reoccurring. However, under the unique facts of the instant case, the statute remains in force; thus the risk of future violations of the same type or nature remain. Discretion still lies with the investigating authority; therefore, some deterrent for the abuse of that discretion must remain to ensure that individual liberties are adequately protected. The rationale of Krull, that no deterrent effect would be served by exclusion of the evidence, is simply not applicable to the facts before the Court.

B. There was no "Good Faith Reliance" on the Language of the Statute.

Krull, in paraphrasing Leon's rationale for admitting illegally obtained evidence states:

Penalizing the officer for the [legislature's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.

Krull, 94 L.Ed 2d at 375 (citations omitted).

Here, the error cannot be laid at the legislature's feet. Had the legislature erred in drafting the statute, so that an objective reading of the Subpoena Powers Act allowed acts in violation of constitutional principles, the Act, by definition, would be facially unconstitutional. See Nowak, Constitutional Law, p. 600 (1983). This Court, in In re Criminal Investigation, 754 P.2d at 658. Therefore, any error in the application of the statute is the error of the person responsible for interpreting and enforcing the act; in this instance, the Attorney General.

The situation is analagous to a police officer making a stop for "probable cause." The officer has authority to stop someone provided he has "probable cause" to do so. What constitutes probable cause is difficult to determine, yet, an officer may have to make that decision several times a day without time for deliberation or research into the latest court opinion. If the officer is wrong in his subjective judgment regarding probable cause, the evidence seized as a result of the stop and any subsequent search must be suppressed. See State v. Mendoza, 748 P.2d 181, (Utah 1987).

Here, the Attorney General was authorized to "conduct a criminal investigation." Although the Subpoena Powers Act may not have been as precise and complete as it could have been in

outlining how this was to be done, it contained much more specific guidelines than are available to an officer making a decision to stop for "probable cause." Like the officer, the Attorney General must be familiar with prior court rulings on search and seizure. He must be aware that "all witnesses must be able to claim the privilege against self-incrimination." See State v. Ruggeri, 19 Utah 2d 216, 222-23, 429 P.2d 969, 973 (1967); see also In re Criminal Investigation, 754 at 646. He must be aware that some type of warning is required to make the exercise of that privilege meaningful. Miranda v. Arizona, 384 U.S. 444, 469 (1966); see also In re Criminal Investigation, 754 P.2d at 22. He must know that adequate records of the investigation be kept to allow for meaningful judicial supervision. See In re Criminal Investigation, 754 P.2d at 653. In short, the Attorney General, in applying not only the Subpoena Powers Act, but any statute he is empowered to enforce, must know the constitutional limitations imposed on the statute by rulings of the Court, and by the language of the constitution.

The Attorney General's task in that respect is no more difficult than that of the rookie patrol officer who must make a determination of probable cause. However, the Attorney General's education, training and experience give him a greater knowledge of the law. He has tremendous resources at his disposal, including up-to-the-minute access to the latest court opinions on any subject. He is not forced to make his decision on how the

investigation is to be conducted at the spur of the moment or with his life at peril. Appellants ask merely that the Attorney General in this case be held to the same standard as any police officer. In making a subjective judgment on whether his actions meet constitutional requirements, there should be no difference between the officer's judgment regarding probable cause and the Attorney General's interpretation of a facially valid statute. When the Attorney General is wrong in determining when his actions infringe on the constitutional rights of a citizen he should not be allowed to avoid the suppression of the evidence wrongly seized as a result of his misjudgment.

In this case, due to the validity of the statute, not only was there no reliance on the statutory language as in Krull, but the violations of the specific restrictions approved by Judge Bunnell obliterated any claim that such reliance could have been made in "good faith." Judge Bunnell, concerned with the way the investigation was proceeding, outlined certain specific constitutional requirements and stated that he would give the Act the presumption of constitutionality so long as it was conducted within that framework. On reconsideration Judge Bunnell observed:

Since that ruling, the court has had opportunity to see the manner in which the act has been applied and is being applied and the way it can be used to violate the personal rights of the citizens of this state. . . . the act has been abused and is subject to continued abuse. . . .

Appendix at Page 6.

As untenable as any claim of "good faith reliance" may have been prior to the issuance of the guidelines by the district court, any vestige of such reliance was obliterated once Judge Bunnell gave specific direction as to how the investigation was to be conducted. From that point, no violation of Appellants' rights could have been made in "good faith."

The Court of Appeals relied on Krull without any analysis of the facts of this case. After outlining the principle stated by Krull the Court of Appeals simply stated: "Likewise, in the instant case, subpoenas duces tecum were executed in objective reasonable reliance on prior, external authorization." State v. Thompson, 751 A.2d at 809-10.

A police officer acting on a valid warrant has "prior external authorization," but only to act within constitutional bounds. Even with a valid warrant he cannot violate the suspects Fourth Amendment rights by exceeding the limits of the warrant, Kremen v. U.S., 353 U.S. 346 (1957); or his Fifth Amendment rights, or right to counsel; Gideon v. Wainwright, 372 U.S. 335 (1963); nor can he deny the suspects due process of law. All government action, whether by prior authorization of statute or judicial authority must be conducted within the bounds set by the Constitution. The fact that the Subpoena Powers Act allowed the issuance of subpoenas in aid of the criminal investigation did

not nor cannot authorize the manner in which the investigation was conducted.

"Objectively reasonable reliance" does not follow automatically from the fact that there was "prior external authorization." In this case there was no objective reliance on the statute. The statute as written called for subjective interpretation in application of constitutional principles external to the statutory language. Reliance solely on the statutory language removed from overriding constitutional principles could not be made in good faith especially after specific constitutional guidelines were set by Judge Bunnell. These guidelines were violated by the State in this case. Appellants' rights were violated as a result. The remedy provided for such constitutional violations is suppression of the evidence seized. See State v. Northrup, 756 P.2d 1288. Both the trial court and the Court of Appeals erred by failing to afford Appellants this remedy.

C. The Exclusionary Rule Exception found in Illinois v. Krull Cannot Apply to State Constitutional Violations.

The Court of Appeals' reliance on Krull is misplaced. Krull does not, and cannot, apply to violations of the Utah Constitution.

Article I, Section 14 of the Utah Constitution was intended to prevent state-authorized intrusion into private citizens' papers, records, personal privacy and dignity. See In Interest of I., R.L., 739 P.2d 1123 (Utah App. 1987). The framers of the

Utah Constitution included the provisions of Article I, Section 26 to ensure that rights guaranteed by our State Constitution could not be infringed by any governmental action. Article 1, Section 26 of the Utah Constitution states: "Provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." The Utah Constitution, Article I, Section 14 states that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated." The language of Article I, Section 14 is clear and unambiguous. Article 1, Section 26 prohibits giving any effect to a statute passed in violation of Constitutional provisions. The result of Illinois v. Krull is to give effect to a statute in derogation of rights guaranteed by the Constitution. Article I, Section 26 prohibits this result. In Walton v. State Road Comm'n, 558 P.2d 609 (Utah 1976), Justice Maughn, in dissent, expressed this view regarding the effect of Article I, Section 26 on the rights guaranteed by Article I, Section 22, (prohibiting the taking of private property without just compensation). He stated:

This provision is mandatory and prohibitory, and I do not believe the legislature can attach to it a limitation which in effect repeals it.

Id. at 611.

Similar views regarding the effect of Article I, Section 26 have been expressed in Romney v. Barlow, 24 Utah 2d. 226, 469

P.2d 497 (1972)(Callister, dissenting); Mattheson v. Monson, 588 P.2d 147, 153 (Utah 1975)(Hall, dissenting); Hume v. Small Claims Court of Murray City, 590 P.2d 309 (Utah 1979) (Ellett, dissenting).

The mandatory and prohibitory language of Article 1, Section 26 prevents the legislature from abrogating, limiting or modifying rights guaranteed by the State Constitution. It embodies the principle argued by James Otis in Paxton, Quincy 51 (Mass. 1761), that "an act against the Constitution is void." 2 Works of John Adams, 523-528 (C. Adams, ed. 1850). Article I Section 26 cannot simply be ignored. As stated by Chief Justice John Marshall in Marbury v. Madison, 5 U.S. 137, 174 (1 Cranch 1803), "It cannot be presumed that any clause in the Constitution is intended to be without effect . . ."

The Court of Appeals' ruling, based on the holding of Krull must be reversed. Article I, Section 26 mandates that the protections granted by the Utah Constitution cannot be abrogated, even on a temporary basis, by a legislative enactment.

D. The Court of Appeals Failed to Recognize State Constitutional Violations as an Independent Basis for Exclusion.

Irrespective of the prohibition of Article I, Section 26, this Court should decline to apply the rationale of Krull to violations of Appellant's rights under the State Constitution. It is well-established that state courts can expand the protection offered by their state constitutions beyond the scope of the

Federal Constitution. See State v. Brooks, 638 P.2d 537 (Utah 1981); Valley Bank & Trust v. Rite Way Concrete, 742 P.2d 105 (Utah App. 1987).

The instant case is illustrative of the necessity of doing so. The reasons for not applying Krull to violations of Article I, Section 14 are best articulated by the four dissenting Justices in Krull. In Justice O'Connor's persuasive dissenting opinion, she condemns the holding of the majority for providing a grace period for legislation during which the state is permitted to "violate Constitutional requirements with impunity." Krull 94 L.Ed. 2d at 382. Justice O'Connor states that Statutes authorizing unreasonable searches were a central concern of the framers of the Fourth Amendment. Id. at 383. The Fourth Amendment is the embodiment of the idea that no legislative act can authorize an unreasonable search. The fact that legislators fail, on occasion, to adhere to the requirements of the Fourth Amendment is evidenced by the many statutes held unconstitutional on fourth amendment grounds. See Krull, supra, See eg., Ybarra v. Illinois, 444 U.S. 85 (1979); Sybron v. New York, 392 U.S.40 (1968); State v. Mendoza, 748 P.2d 181 (Utah 1987). The fact that legislators are subject to political pressures to "get tough" on law breakers gives motivation to invade rather than protect Fourth Amendment rights. The exception provided by the Krull majority adds the further temptation to promulgate questionable laws under which convictions could be obtained by using tainted evidence.

In dealing with the Utah Constitution search and seizure provision, Article I, Section 14, the arguments voiced by Justice O'Connor are persuasive because they return to the constitutional language and the purpose it was designed to serve. In developing Krull, the Federal Court relied on an extension to a principle stated in an exception to a remedy designed to protect against the violation of the constitutional provision. When the principle becomes this attenuated from the source, it loses its validity. Article I, Section 27 of the Utah Constitution desires to prevent such occurrences. It states: "Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government." By returning to the source of the rights granted and the purposes for granting them, rather than allowing the right to be obscured by the body of law that has grown up around it, results such as Krull cannot be reached.

In Krull, the legislature passed an unconstitutional statute; it was applied to an individual who challenged it; it was conceded that the application of the statute violated his rights, yet he is provided no remedy. Article I, Section 14 should not yield such an anomalous result. The purpose behind Section 14 is to protect the privacy of the individual against intrusion by the state through prohibiting the passage of laws which invade individual rights. Where individual rights are violated, the

individual who prevails in showing that a statute, or the application thereof, violated his rights should be vindicated.

The result reached in Krull has the effect of not only encouraging legislatures to violate constitutional rights with impunity, it has the more insidious vice of preventing such laws from being reviewed by the courts. A person who feels his rights have been violated has no motivation under Krull to go through the time, expense and bother of an appeal since even if he is successful in showing the unconstitutionality of the Statute, he himself is afforded no remedy. This impedes the Court's role in protecting constitutional rights.

This Court should not allow individual liberties to be compromised in this fashion. By declining to follow Krull in extending the exception to the exclusionary rule for violations of State Constitutional rights, this Court ensures that the right of the people of this state "to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated." Utah Constitution, Article I, Section 14.

CONCLUSION

Suppression of the evidence, as requested in Appellants' pretrial motion is mandated by the facts and circumstances of this particular case. Appellants were the targets of an investigation which, by admission of the State, was carried out in an unconstitutional manner. The trial court admitted evidence based

on an unconstitutional statute. The Court of Appeals nevertheless affirmed the trial court on a principle of federal law which is not applicable to violations of our State Constitution and which has no application to the facts of this case. For all of these reasons, Appellants respectfully request that the trial court's ruling denying their motion to suppress be reversed.

Respectfully submitted this ____ day of December, 1988.

SESSIONS & MOORE

JOHN F. CLARK
CLARK L. SNELSON

CERTIFICATE OF HAND-DELIVERY

I hereby certify that I caused to be hand-delivered, four true and accurate copies of the foregoing BRIEF OF APPELLANTS on this the ____ day of December, 1988, to:

David L. Wilkinson
Stanley H. Olsen
Utah State Attorney General
Attorneys for Respondent
236 State Capitol Building
Salt Lake City, Utah 84101

APPENDIX

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Chief, Litigation Division
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236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 533-7626

IN THE SEVENTH JUDICIAL DISTRICT COURT OF EMERY COUNTY
STATE OF UTAH

IN THE MATTER OF A : SUBPOENA DUCES TECUM
CRIMINAL INVESTIGATION : CS NO. 1

THE STATE OF UTAH TO:

Norman Maxfield
1407 West North Temple
Salt Lake City, Utah 84116

You are hereby commanded to set aside all business and excuses and appear at the Office of the Attorney General of the State of Utah, 236 State Capitol, Salt Lake City, Utah, at the hour of 900 A.m., on Fri, the 13th day of April, 1984, to give testimony in support of a criminal investigation. You are entitled to be represented by legal counsel.

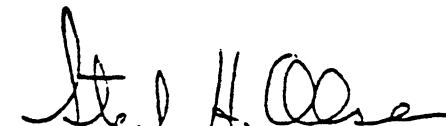
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You are also commanded to bring with you any and all books, records, documents, accounts, or papers pertaining to Mike Thompson, Mike Ziemski, Bruce Conklin, et al., MTA, Vanguard, Great Basin Patrol, and L. Brent Fletcher.

This subpoena duces tecum is authorized by order of the District Court. Disobedience to this order is punishable by contempt of Court.

Given under my hand this 4th day of April, 1984.

DAVID L. WILKINSON
Attorney General
PAUL M. WARNER
Assistant Attorney General
Chief, Litigation Division

A handwritten signature in dark ink, appearing to read "Stanley H. Olsen", is written over a horizontal line.

STANLEY H. OLSEN
Assistant Attorney General
Attorney for State of Utah

SEP 21 1924

By BRUCE C. FUNK, 12 Depu

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR EMERY COUNTY,
STATE OF UTAH

IN THE MATTER OF
A CRIMINAL INVESTIGATION

MEMORANDUM DECISION
RELATIVE TO
CONSTITUTIONALITY

CS NO. 1

On September 12, 1984, a hearing was held in this Court pursuant to Notice on Motions submitted by parties who were subject to subpoena under this Criminal Investigation proceeding. The Court ruled from the bench on most Motions and took under advisement the challenge to the constitutionality of the Act (77-22-1 et seq.), authorizing the investigative procedure being used as raised by several of the parties for the first time in their own behalf and by other parties on a Motion to reconsider.

The Court previously considered the constitutional challenge to the Act at a hearing held on May 30, 1984, and the Court ruled at that time that the Court would give the Act the presumption of constitutionality provided that in its application the State Prosecutors comply with the following requirements:

1. Witnesses subpoenaed pursuant to the Act must be informed whether or not they are targets of the investigation;

2. Such witnesses must be informed of the nature of the matter under investigation and the scope of the investigation;

3. Investigations conducted under the authority of the Act must be limited to criminal investigations within the parameters of the initial good cause affidavit.

Since that ruling, the Court has had opportunity to see the manner in which the Act has been applied and is being applied and the way it can be used to violate the personal rights of the citizens of this state.

For instance, the subpoena duces tecum served upon Emery Mining Company commands that Company to produce:

"records which identify all officers, directors, consultants and employees (both union and non-union, professional and mining) of Emery Mining for the period 1979 to the present. Such shall include, but not be limited to, names, addresses, telephone numbers, dates of employment and employee numbers, if known."

Upon challenge, this Court ordered that general subpoena suppressed as being too broad in any investigation of any criminal activity.

A previous subpoena issued by the Attorney General's Office attempted to get into Utah Power and Light Company's dealings in uranium mining, when in fact the original Good Cause Affidavit mentioned no indication of any criminal dealings in this area. The State withdrew this subpoena when challenged in this court.

Another subpoena issued out of this proceeding was directed to a CPA firm and ordered the production of the following:

"You are commanded to bring with you any and all books, records, papers of any kind relating to Mike Thompson and Associates, Guardex, Alarmex, Vanguard, Mike Thompson, individually; Mike Ziemski, individually; Bruce Conklin, individually; Patsy Bowman, individually; and all other individuals and/or entities associated therewith."

This subpoena was withdrawn by the State upon challenge in this Court.

The deposition of L. Brent Fletcher, taken pursuant to subpoena issued under this investigative proceeding, did not comply with the requisites that this Court feels must be imposed to make the Act constitutional in its application in that the witness never was informed that he was a target, nor as to the nature of the investigation and, because of the Secrecy Order, he had no way of knowing whether the matter being inquired into was within the perimeter of the good cause showing. He was allowed, and did have, his attorney present with him during these proceedings.

Some criminal charges have already been filed in Salt Lake County based upon information obtained through this proceeding, and a civil anti-trust case has been filed in Salt Lake County, also as a result of some of the information derived from this investigative proceeding. This investigative proceeding is

still open and being used for whatever purposes the State desires and solely within their discretion under the Act, without limitation as to when a criminal investigation becomes a prosecution or controlling the ultimate use of the findings for civil purposes.

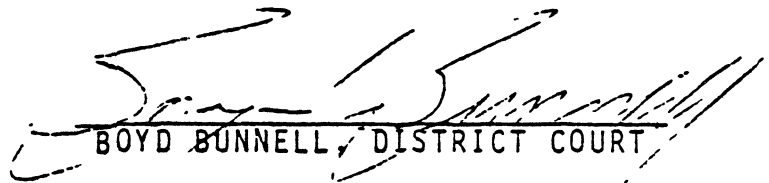
The Act has been abused and is subject to continued abuse under its broad terms and provisions that set no limitations upon the State or any guidelines to the use of their subpoena power. The Court quite agrees with the Utah Supreme Court in its statement given in the case of *In Re The Matter of Nelda Boyer*, 636 P2d 1085, wherein the Court states as follows:

"When State action impinges on fundamental rights, due process requires standards which clearly define the scope of permissible conduct so as to avoid unwarranted intrusion on those rights."

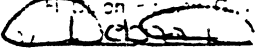
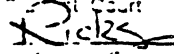
This Court has, therefore, concluded that the Act is too vague and does not give proper protection to individual citizens against violation of their constitutional right of due process and protection against self-incrimination and allows for an absolute abuse of power without the benefit of judicial review or control once the general subpoena power is granted and finds the Act is unconstitutional.

THEREFORE, the Court does hereby dismiss this
Criminal Investigative Proceeding and strikes the Investigative
Subpoena Power heretofore granted to the State by this Court.

DATED this 20th day of September, 1984.


BOYD BUNNELL, DISTRICT COURT

JAN 10 1985

 
David Schwendiman
Stanley Olsen

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MEMORANDUM DECISION
Plaintiff,	:	CASE NO. CR-84-1115
vs.	:	
L. BRENT FLETCHER, MICHAEL C.	:	
THOMPSON, BRUCE A. CONKLIN,	:	
and MICHAEL ZIEMSKI,	:	
Defendants.	:	

The defendants' Motion to Suppress was heard by the Court on the 27th day of December, 1984. The State of Utah was represented by Stanley Olsen, David Schwendiman and Suzanne Dallimore, Assistant Attorney Generals, and the defendants by Harold Christensen, Esq., Max Wheeler, Esq., and Sumner J. Hatch, Esq. The Court heard oral arguments of counsel after having reviewed the extensive Memoranda filed. At this hearing the Court ruled that Judge Bunnell's ruling that the "Subpoena Powers Act," Utah Code Ann., Section 77-22-1, was unconstitutional was the law of this case. However, the Court took under advisement the issue as to whether the evidence gathered by the State pursuant to the Subpoena Powers Act should be suppressed as a matter of law.

Defendant claims that the evidence obtained by the State through the use of the "Subpoena Powers Act," Utah Code Ann., Section 77-22-1, et seq., must be suppressed. While defendants

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acknowledge that no Utah authority exists for this position, they cite United States v. LaSalle National Bank, 437 U.S. 298 (1978), and United States v. Genser, 595 F.2d 146 (3d Cir. 1979) (Genser II), as supportive of suppression. These cases are not on point.

In LaSalle National Bank an Internal Revenue Service agent asked the United States District Court to enforce a summons issued to the bank under 26 U.S.C. 7602. The district (trial) court ruled the summons unenforceable because the agent was conducting a criminal investigation and Section 7602 is a civil summons power (unlike the Subpoena Powers Act in the present case which specifically authorizes criminal investigations). The Supreme Court did not address the issue of suppression, but instead referred the case to the District Court to determine if the summons had been issued to gather evidence for both a civil and a criminal prosecution or if it had been issued solely to gather evidence for a criminal prosecution.

Defendants also cite Genser II as authority for the position that evidence gathered pursuant to the "Subpoena Powers Act" must be suppressed. In Genser II, the Internal Revenue Service had issued summonses under Section 7602. Defendants were convicted of tax evasion and appealed on the grounds that the summonses issued during the investigation exceeded the I.R.S.'s authority. The appellate court remanded the case to the district court

for an evidentiary hearing on the defendants' contention that the I.R.S. had exceeded its authority. On remand, the district court concluded that the summonses employed during the investigation were not issued solely for a criminal purpose as defined in LaSalle National Bank. The defendants challenged that ruling on the grounds that the district court had misconstrued the substantive requirements of LaSalle National Bank. The appellate court again remanded the case to the district court on the basis that the proper focus under LaSalle National Bank should have been on the purpose of the individual summonses not on the purpose of the investigation as a whole as the district court had concluded. The appellate court stated that:

If any one of those summonses were issued solely for a criminal purpose, the fruits of that summons would have to be suppressed, even in the face of an overwhelmingly civil purpose of the investigation as a whole.
Id. at 150

While the court in Genser II cites no authority for the conclusion that the evidence must be suppressed and gives no standards for when suppression is mandated, these issues were addressed at length in United States v. Genser, 582 F.2d 292 (3d Cir. 1978) (Genser I). In Genser I, the court indicated that, under LaSalle National Bank, in order for a summons to be validly issued it must first be issued before the Service recommends to the Department of Justice that a criminal prosecution

be undertaken and second, the Service at all times must use the summons authority in good faith pursuit of the congressionally authorized purposes of Section 7602 -- not in an attempt to garner evidence in furtherance of a solely criminal investigation. The party opposing the summons bears the burden of disproving the existence of a valid civil tax determination or collection purpose on the part of the I.R.S. The Genser I court also indicated that the purpose of making the suppression remedy available to taxpayers was to ensure governmental compliance with the requirements of Section 7602. Thus, the holding in Genser II is limited to those cases where a governmental agency has: (1) acted in bad faith, and (2) abused a statutory right, and where (3) suppression would ensure compliance with the statutory provision in the future.

Assuming, as defendants contend, that the present case is governed by the same standards as violations of Section 7602, there has been no showing in this case that the State acted in bad faith, or that suppression of the evidence would ensure governmental compliance in the future. Thus, the defendants have failed to meet their burden of proof with respect to whether the evidence obtained under the Subpoena Powers Act ought to be suppressed even under the standard advanced by them. Furthermore, it is questionable whether the Section 7602 standards should be applied in the present case since in Genser I the court clearly

indicated that these standards were specifically created to deal with a particular type of governmental violation of the Internal Revenue Code.

The appropriate standard for suppression of the evidence acquired under the "Subpoena Powers Act" in this case requires that the defendants show, as the State contends, a "substantial violation" of the defendants' constitutional rights and that the violation was "not committed in good faith," as required by Rule 12(g), Utah Rules of Criminal Procedure (Section 77-35-1-2(g)). Defendants have neither acknowledged this Rule, nor attempted to meet the required showing for suppression of evidence.

The United States Supreme Court in Segura v. United States, 82 L.Ed.2d 599 (1984); United States v. Leon, 82 L.Ed.2d 677 (1984); and Massachusetts v. Sheppard, 82 L.Ed.2d (1984), discusses the history and reasoning behind the Fourth Amendment and its vital protections and recognizes that suppression is not automatically and blindly imposed each time there is an irregularity in the manner in which evidence is gathered. A ruling that the use of the "Subpoena Powers Act" in this case was unconstitutional does not automatically mandate suppression of the evidence obtained thereunder. Defendants must also establish a substantial violation of their constitutional rights, as well as evidence that the actions taken by the prosecution were not taken in good faith reliance upon the validity of the statute.

The Court is particularly persuaded by the following language in Leon, supra:

* * *

We have not required suppression of the fruits of a search incident to an arrest made in good faith reliance on a substantive criminal statute that subsequently is declared unconstitutional. Michigan v. DeFillippo, 443 U.S. 31, 61 L.Ed.2d 343, 99 S.Ct. 2627 (1979). . .


Leon, supra, makes reference to Michigan v. DeFillippo, 443 U.S. 31, 61 L.Ed.2d 343, 99 S.Ct. 2627 (1979), where the court held that a finding that a criminal statute is unconstitutional does not require suppression of the fruits of an arrest made in good faith reliance on the statute.


These cases stand for the principle that suppression of evidence is not automatic. The DeFillippo case demonstrates that a search made in good faith reliance on a statute subsequently declared unconstitutional does not require suppression.

Based upon the foregoing reasoning, the defendants' Motion to Suppress is denied as they have not shown: (1) that the State's conduct in its use of the "Subpoena Powers Act" in this case resulted in a substantial violation of the defendants' constitutional rights, and (2) that the acts of the State were not committed in good faith reliance on what it assumed was a constitutional criminal statute.

If the defendants believe the facts conform to the above-cited standard, then the matter should be set for an evidentiary hearing in order that defendants may attempt to meet their burden.

Dated this 15th day of January, 1985.


JUDITH M. BILLINGS
DISTRICT COURT JUDGE

ATTEST
H. DIXON HINDLEY
Clerk

Deborah D. Nickles
Deputy Clerk